Filed 11/2/09 P. v. Coto CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. WILMER ALEXANDER COTO, Defendant and Appellant.	B212394 (Los Angeles County Super. Ct. No. BA330970)

APPEAL from a judgment of the Superior Court of Los Angeles County. Larry P. Fidler, Judge. Affirmed as modified.

Richard A. Levy, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Paul M. Roadarmel, Jr. and Daniel C. Chang, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Wilmer Alexander Coto appeals from a judgment entered after the jury returned a verdict of guilt on counts 1 through 10 of forcible lewd acts upon a child (Pen. Code, § 288, subd. (b)(1))[1] and counts 11 and 12 of aggravated sexual assault of a child (§ 269, subd. (a)(1)).

The trial court sentenced appellant to a determinate term of 64 years in state prison, plus two consecutive indeterminate terms of 15 years to life, calculated as follows: for counts 1 and 3 through 9, the court imposed for each count the upper term of eight years to be served consecutively; for counts 2 and 10, the court imposed and stayed two 8-year prison terms pursuant to section 654; and for counts 11 and 12, the court imposed two consecutive terms of 15 years to life.

We affirm.

CONTENTIONS

Appellant contends that: (1) the trial court erred by instructing the jury with CALCRIM No. 3501 instead of CALCRIM No. 3502; (2) the trial court committed prejudicial error in denying appellant's motion to suppress his statement to the hospital nurse; (3) the trial court committed prejudicial error on counts 5 and 7 by failing to sua sponte instruct on the lesser included offense of attempted lewd conduct; and (4) the trial court failed to award full presentence credits.

FACTS AND PROCEDURAL BACKGROUND

In November 2006, 11-year-old L.V. moved from Honduras to live with her mother, Andrea R., in Los Angeles. Appellant and F.C., appellant's two-year-old son with Andrea R., also lived with L.V. and Andrea R. L.V. slept on a bed inside a closet. Andrea R. and appellant slept on a bed in the living room. Appellant installed a lock in the closet, but later removed it when L.V. used it to keep appellant out of the closet.

---

[1] All further statutory references are to the Penal Code unless otherwise indicated.

Andrea R. worked full time during the week and on Saturday. Appellant worked full time during the week and occasionally on Saturday.

Appellant had sexual intercourse and fellatio with L.V. against her will between May 14, 2006, and October 24, 2007, threatening to harm her and her family if she told anyone. The sexual contact began on a Saturday while Andrea R. was at work about two months after L.V. moved into the apartment. The first time, appellant touched L.V. in her closet and grabbed and kissed her. He fondled her breasts over her clothes, put his hand under her clothes, and touched her vagina. Appellant had sexual intercourse with her three times on three different Saturdays in the closet. The first time appellant had sexual intercourse with L.V. in the closet he touched her breasts and vagina over her clothes despite her pleas to him to leave her alone. Appellant removed her clothes and inserted his penis into her vagina, hurting her lower stomach and vagina. On the second occasion, L.V. threw herself on the ground when appellant came into her closet and tried to cover herself to prevent appellant from removing her pants, but appellant had sexual intercourse with her. On the third and last occasion in the closet, appellant had sexual intercourse with L.V. despite her struggles.

L.V. testified that appellant had sexual intercourse with her on the bed in the family room approximately six times on six different Saturdays. L.V. testified as to the following specific incidents. The first time, L.V. was watching television on the bed when appellant had sexual intercourse with her. On another occasion, appellant attempted to take L.V.'s clothes off in the living room. When his son came into the room and asked what he was doing, appellant got him something to eat. Appellant then proceeded to have sexual intercourse with L.V. on the bed.

L.V. testified that appellant attempted to or did commit fellatio or cunnilingus with L.V. several times. On one occasion, appellant grabbed L.V.'s head and tried to force his penis into her mouth. She did not open her mouth, and his penis only touched her lips. On another instance, appellant tried to take off L.V.'s clothes and asked her to lick his penis. He grabbed her by the head, and forced his penis in her mouth and ejaculated.

L.V. vomited when semen came out of his penis. On another occasion, appellant spread L.V.'s legs while she sat on the bed, and tried to take off her pants, saying he wanted to lick her vagina. L.V. pushed him off and ran away.

On October 20, 2007, appellant took L.V. and F.C. to Griffith Park. When appellant began to take off his clothes in the car, L.V. said she was tired of him and was going to tell someone. He had sexual intercourse with her and gave her a hickey on her breast. Afterward, he threatened to throw her off a cliff.

After the last incident, L.V. told a neighbor, Nora Nerio (Nerio), that appellant had been abusing her. When L.V. did not follow Nerio's advice to talk to a teacher or counselor, Nerio called the Department of Children and Family Services. The police picked L.V. and F.C. up at school and took them to the police station. Appellant and Andrea R. went to the police station where appellant was arrested.

On October 24, 2007, after being advised of his rights under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*) and relinquishing them, appellant was interviewed by Los Angeles Police Department Detectives Maria Palacios and Maria Singh. He initially denied sexually abusing L.V., but eventually admitted to having sexual intercourse because L.V. made advances to him and "the flesh is weak." He subsequently admitted to two or three, then 10 or 11 instances of sexual intercourse. He admitted sucking on L.V.'s breasts and giving her hickeys, but he denied engaging in fellatio or cunnilingus. Toward the end of the interrogation, he dictated and signed a letter to L.V., in which he apologized for having sexual intercourse with her, admitted he ruined her life just as she ruined his life, and stated that he knew that he was going to jail. The letter stated that it was L.V.'s fault for provoking appellant by messing around with him and asking him to teach her how to have sex. During the interview, appellant was told: "You'll also be examined, then, there will be evidence as to whether this is happening, if this is happening, that's when we'll be able to tell." The interview ended at 9:05 p.m. and appellant was transported to the hospital.

On October 25, 2007, at 12:25 a.m., Theresa Saracho (Saracho), a forensic nurse at the USC Medical Center examined appellant. Saracho conducts medical interviews and collects forensic evidence from victims and perpetrators of sexual abuse or assault. Appellant was wearing handcuffs when he was escorted into the examination room by police officers, who remained in the room throughout the examination. Saracho asked appellant if he knew why he was in the clinic. He replied that he was being accused of sexual assault against L.V. When she asked appellant if it was true, appellant replied affirmatively. He said it had been occurring for four months and that L.V. asked for it by putting on a miniskirt in front of him. Saracho gave biological samples to an officer to book as evidence to take to the crime laboratory. Saracho prepared a report in connection with appellant's examination.

On October 24, 2007, L.V. was examined by Saracho. L.V. told Saracho that appellant first sexually assaulted her six months previously, while she was at home watching television. Appellant kissed her on the mouth, neck, and breasts. She said he then took off all of his clothes and "put his penis in and out, and that it hurt her for a couple of days." L.V. told Saracho the last incident occurred on October 20, 2007, four days before the examination. During that incident, appellant sexually assaulted her in a car, afterward using his shirt to wipe white stuff off his penis. Saracho testified that L.V. had a laceration on her hymen that was healing. She also had a suction injury or hickey, on her left breast. Saracho opined that L.V. had been sexually abused and/or had sexual contact.

Appellant testified in his defense that his incriminating admissions were fed to him by the police and that he made them as the result of pressure and threats by the police and Saracho. He testified that he never had sexual intercourse with L.V., forced her to have oral sex with him, or touched her breasts or vagina.

DISCUSSION

I. The trial court was not required to instruct the jury with CALCRIM No. 3501, but appellant was not prejudiced

Appellant argues that the trial court erred by instructing the jury with CALCRIM No. 3501 instead of CALCRIM No. 3502 because CALCRIM No. 3501 allowed the jury to convict him based on any of the uncharged offenses proven by L.V.'s or appellant's testimony, rather than on the specific acts as stated in the People's election. We find that because the People made an election, the trial court was not required to instruct the jury with CALCRIM No. 3501. However, appellant did not suffer prejudice when the trial court instructed with CALCRIM No. 3501 instead of CALCRIM No. 3502.

We first note that after the People initially requested CALCRIM Nos. 3500 and 3501, but later withdrew its request for those instructions and instead requested CALCRIM No. 3502. Later, defense counsel reminded the trial court to give CALCRIM No. 3502. After considering the three instructions, the trial court decided to give CALCRIM No. 3501. Defense counsel and the People agreed that CALCRIM No. 3501 was the correct instruction and that both parts of that instruction should be given. Because it is not clear whether a defendant's approval of a court's instruction is equivalent to a request for an instruction, which would constitute invited error, we review the matter for instructional error. (*People v. Lucero* (2000) 23 Cal.4th 692, 723-724.)

In a criminal case, a jury verdict must be unanimous. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) Where there is evidence of distinct acts that may constitute a charged crime, the jury must unanimously agree on which act that conviction was based on. (*People v. Davis* (2005) 36 Cal.4th 510, 560-561.)

Here, the jury was instructed with CALCRIM No. 3501 that "The defendant is charged with forcible lewd act upon a child and aggravated sexual assault of a child in counts 1-12 sometime during the period of May 14, 2006 to October 24, 2007. The People have presented evidence of more than one act to prove that the defendant committed these offenses. You must not find the defendant guilty unless: 1. You all

agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act he committed for each offense; OR 2. *You all agree that the People have proved that the defendant committed all the acts alleged to have occurred during this time period and have proved that the defendant committed at least the number of offenses charged.*" (Italics added.)

Appellant contends that the prosecutor elected to base 10 specific acts (for a total of 12 counts) on L.V.'s specific detailed testimony during the People's closing argument. Appellant argues that the trial court therefore should have instructed with CALCRIM No. 3502,[2] which he claims should be used when the evidence is detailed enough to permit an election instead of with CALCRIM No. 3501, the pattern instruction for generic testimony. He claims that the italicized second portion of CALCRIM No. 3501 allowed the jury to convict based on any of the uncharged offenses proved by L.V.'s or appellant's generic testimony, rather than on the specific acts stated in the elections.

Second, we note that the People appear to have made an election as to specific counts. The record shows that in closing argument, the People stated: "So we have only alleged 12 counts. This is a conservative prosecution, and they are based upon 10 specific incidents that [L.V.] can recall, and I will explain to you later why we have two additional counts, but it is based on 10 specific incidents." The People argued that count 1, lewd act, referred to the first incident in the closet when appellant groped L.V.'s breasts and vagina. As to count 2, lewd act, the People referred to the first act of sexual

---

[2] CALCRIM No. 3502 provides: "3502 Unanimity: When Prosecution Elects One Act Among Many [¶] You must not find the defendant guilty of <*insert name of alleged offense*> [in Count ___] unless you all agree that the People have proved specifically that the defendant committed that offense [on] <*insert date or other description of event relied on*>. [Evidence that the defendant may have committed the alleged offense (on another day/ [or] in another manner) is not sufficient for you to find (him/her) guilty of the offense charged.]"

intercourse that occurred in the closet. Count 3, lewd act, referred to the incident in the closet where L.V. dropped to the floor in an attempt to thwart appellant's subsequent act of sexual intercourse with her. Count 4, lewd act, involved the third and last act of sexual intercourse in the closet. Count 5, lewd act, occurred when appellant put his penis against L.V.'s lips, but she fought him off and kept her mouth closed. Count 6, lewd act, occurred when appellant forced his penis into L.V.'s mouth and ejaculated, causing L.V. to vomit. Count 7, lewd act, occurred when appellant told L.V. that he wanted to lick her vagina, put L.V. on the bed and tried to remove her clothing, but she ran away. Count 8, lewd act, pertained to the first time that appellant had sexual intercourse with L.V. on the bed. Count 9, lewd act, related to the incident where appellant distracted F.C. by giving him food, then continued to have sexual intercourse with L.V. on the bed. Count 10, lewd act, concerned the incident at Griffith Park. Count 11, aggravated sexual assault, occurred as recounted in count 2, when appellant committed the first act of sexual intercourse in the closet. Count 12, aggravated sexual assault, occurred as recounted in count 10, when appellant committed sexual intercourse at Griffith Park.

Typically, when the People select the acts relied on to prove the charges a unanimity instruction need not be given. The "'either/or'" rule applies "where the number of specific sex acts adduced at trial exceeds the number of such acts pleaded in the information: Either the prosecutor must select the acts relied on to prove the charges, or the jury must be given an instruction that it must unanimously agree beyond a reasonable doubt that the defendant committed the same specific criminal act." (*People v. Jones* (1990) 51 Cal.3d 294, 307.) Thus, the use notes to CALCRIM No. 3205, which is entitled "Unanimity: When Prosecution Elects One Act Among Many" cite *People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534, which holds that "When an accusatory pleading charges the defendant with a single criminal act, and the evidence presented at trial tends to show more than one such unlawful act, *either the prosecution must elect the specific act relied upon to prove the charge to the jury, or the court must instruct the jury*

that it must unanimously agree that the defendant committed the same specific criminal act." (Italics added.)

Because the People made an election, the trial court did not have to instruct with CALCRIM No. 3501.[3] We find that the giving of CALCRIM No. 3501 was superfluous, but not harmful. Part 1 of CALCRIM No. 3501 required the jury to find appellant guilty only if each juror agreed that the People proved that appellant committed at least one of these acts and agreed on which act he committed for each offense. We presume the jury was guided by the People's election and followed the court's instructions. (*People v. Boyette* (2002) 29 Cal.4th 381, 453.) Because the People elected the acts that the jury had to consider for each count, there is no possibility the jury would have misapplied part 2 and considered generic acts instead of the specific acts identified by the People.

Furthermore, assuming the trial court erred in giving CALCRIM No. 3501, rather than CALCRIM No. 3502, we conclude that any error in instruction was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24). In closing argument, the People outlined what incidents had to be proven. The testimony of L.V. was corroborated by Saracho, Nerio, Detective Palacios, and appellant's admissions. The jury's verdict necessarily showed that it rejected in whole appellant's defense that his incriminating admissions were the result of undue pressure and threats, and that he never had sexual intercourse with L.V., forced her to have oral sex with him, or touched her breasts or vagina. (*People v. Dunnahoo* (1984) 152 Cal.App.3d 561, 575 [no prejudicial

---

3 The use notes to CALCRIM No. 3501, which is entitled "Unanimity: When Generic Testimony of Offense Presented" cite *People v. Jones*, *supra,* 51 Cal.3d at pages 321 through 322 which holds: "[W]hen there is no reasonable likelihood of juror disagreement as to particular acts, and the only question is whether or not the defendant in fact committed all of them, the jury should be given a modified unanimity instruction which, in addition to allowing a conviction if the jurors unanimously agree on specific acts, also allows a conviction if the jury unanimously agrees the defendant committed all the acts described by the victim."

error occurred as a result of the trial court's failure to instruct the jury sua sponte on the effect of the doctrine of election, as interpreted by defendant in light of jury's verdict indicating belief in child witnesses' testimony and rejection of defendant's testimony].)

Thus, we find that because the People made an election, the trial court was not required to instruct the jury with CALCRIM No. 3501. However, appellant did not suffer prejudice when the trial court instructed with CALCRIM No. 3501 instead of CALCRIM No. 3502.

II. The trial court did not err in denying appellant's motion to suppress his statement to Saracho

Appellant contends that the trial court erred in denying his motion to suppress his statement to Saracho. He urges that as an agent of the police, she was required to, but did not, readvise him of his *Miranda* rights. We disagree.

Readvisement of *Miranda* rights is unnecessary where the subsequent interrogation is "'reasonably contemporaneous'" with the prior knowing and intelligent waiver. (*People v. Mickle* (1991) 54 Cal.3d 140, 170 [no readvisement necessary where defendant, who showed no evidence of mental impairment, was reinterviewed at a hospital by same officers who had interviewed him in police station, 36 hours after waiving *Miranda* rights].) "The courts examine the totality of the circumstances, including the amount of time that has passed since the waiver, any change in the identity of the interrogator or the location of the interview, any official reminder of the prior advisement, the suspect's sophistication or past experience with law enforcement, and any indicia that he subjectively understands and waives his rights." (*People v. Mickle*, *supra,* at p. 170.)

Assuming that Saracho was an agent of the police, we conclude that no readvisement was necessary. The time between the examination by Saracho and the ending of the first interview was a matter of three hours 20 minutes. The change in identity of the questioners is of minimal assistance to appellant's argument that a readvisement was necessary. During the interview by the police, appellant was advised

that both he and L.V. would be examined by a doctor and that evidence would be collected regarding the alleged sexual assaults. Appellant never left custody during or between both interviews. He was transported by the arresting officers to the hospital in handcuffs shortly after the first interview and was examined by Saracho with the officers present. Nor did appellant show any evidence of mental impairment.

Even if the admission was error, it is beyond a reasonable doubt that appellant was not prejudiced by the admission of the statement. (*People v. Sims* (1993) 5 Cal.4th 405, 447; *Chapman v. California, supra*, 386 U.S. at p. 18.) Despite appellant's attempts to claim prejudice on the basis that his statements to Saracho were unduly prejudicial because they were inflammatory and implied he used force, we conclude that the interview with the detectives which was admitted into evidence, was just as graphic and disturbing. In that interview, appellant admitted that he touched L.V.'s breasts and private parts, sucked on her breasts and caused hickeys, and admitted having sexual intercourse with L.V. 10 to 11 times. He admitted that "the flesh is weak," and blamed L.V. for provoking him by wearing miniskirts, asking him questions about sex, wearing makeup and dancing in front of him.

We conclude the trial court did not err in denying appellant's motion to suppress his statement to Saracho.

III. The trial court had no sua sponte duty to instruct on the lesser included offense of attempted lewd conduct on counts 5 and 7

Appellant contends that the trial court by failing to instruct on the lesser included offense of attempted lewd conduct on counts 5 and 7 because substantial evidence supported the finding that the crimes were only attempts. We disagree.

A lesser included offense instruction is required whenever evidence that the defendant is guilty only of the lesser offense is "'substantial enough to merit consideration'" by the jury. (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) "'Substantial evidence'" in this context is """evidence from which a jury composed of

reasonable [persons] could . . . conclude[]"' that the lesser offense, but not the greater, was committed. [Citation.]" (*Ibid*.)

In order to prove the offense of committing a lewd and lascivious act by force or fear under section 288, subdivision (b)(1), the People must show the defendant willfully and lewdly committed any lewd or lascivious act, upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child. (§ 288, subd. (b)(1).) "'An attempt to commit a crime . . . requires only a specific intent to commit it and a direct but ineffectual act done towards its commission, i.e., an overt ineffectual act which is beyond mere preparation yet short of actual commission of the crime.'" (*People v. Imler* (1992) 9 Cal.App.4th 1178, 1181.)

We conclude that the evidence pertaining to counts 5 and 7 supported the finding that they were completed acts under section 288, subdivision (b)(1) and were not mere attempts. As to count 5, L.V. testified that while she was on the bed in the living room, appellant pulled her by the head and told her that he wanted her to lick his penis. He put his penis against her lips, trying to force his penis into her mouth and make her lick it. Citing *People v. Austin* (1980) 111 Cal.App.3d 110, 112-113, appellant claims the trial court should have instructed on *attempted* lewd conduct because "the jury could have found that grabbing [L.V.'s] head and even touching his penis against her closed lips was not the immediate sexual gratification that he sought. Rather, these acts were preparatory to fellatio and ejaculation." In *People v. Austin*, however, the Court of Appeal found that it was up to the trier of fact to determine if the defendant's touching of the child was done to place her in a more secluded area or provide him with immediate sexual gratification. (*People v. Austin, supra*, at pp. 113-114.) Here the evidence supported the finding that appellant committed the greater offense by gratifying his sexual desires when he touched his penis to L.V.'s lips. Thus, the trial court was not required to instruct on the lesser included offense.

As to count 7, the record shows that L.V. testified that appellant tried to open up her legs, and unbutton and remove her clothing. While he was doing this he told her that he wanted to lick her vagina. Appellant argues that he intended to gratify himself by engaging in cunnilingus only after her pants were off, and therefore the jury should have been instructed with the lesser included crime of attempted lewd conduct. However, the touching need not be inherently lewd. (*People v. Martinez* (1995) 11 Cal.4th 434, 442.) Rather, "section 288 is violated by 'any touching' of an underage child committed with the intent to sexually arouse either the defendant or the child." (*People v. Martinez, supra,* at p. 442.) Thus, the crime was complete when appellant touched L.V. with the intent of sexual arousal.

We conclude that the trial court did not err in failing to instruct on the lesser included offense of attempted lewd conduct on counts 5 and 7.

IV. Appellant is entitled to 388 days of actual credit and 58 days of conduct credit

Appellant argues, and the People concede, that appellant is entitled to 388 days of actual credit and 58 days of conduct credit, rather than the 386 actual days of credit and 57 days of conduct credit awarded by the trial court.

Appellant was arrested on October 24, 2007, and sentenced on November 14, 2008. Pursuant to section 2900.5, appellant is entitled to 388 days of actual credit. He is entitled to 58 days of conduct credit (15 percent of 388 days) pursuant to section 2933.1, which limits worktime, conduct and presentence credits to 15 percent for convictions of violent felonies listed in section 667.5.

DISPOSITION

The judgment is modified to reflect an award of 388 days of actual credit and 58 days of conduct credit. The trial court is ordered to send a corrected abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, P. J.

BOREN

We concur:

_____, J.

ASHMANN-GERST

_____, J.

CHAVEZ